IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 5, 2001

STATE OF TENNESSEE v. THOMAS SLATES

Appeal from the Circuit Court for Gibson County
No. 15948 L.T. Lafferty, Judge

No. W2001-01349-CCA-R3-CD - Filed May 8, 2002

The defendant, Thomas Slates, was indicted for three counts of selling cocaine in an amount greater than .5 grams, a Class B felony. See Tenn. Code Ann. § 39-17-417(a)(3), (b). The jury returned a guilty verdict on the first count, a not guilty verdict on the second count, and could not reach a verdict on the third. The trial court imposed a Range I sentence of eight years on count one. In this appeal of right, the defendant contends that (1) the evidence was insufficient; and (2) the trial court erred by failing to consider alternative sentencing. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which DAVID H. WELLES and DAVID G. HAYES, JJ., joined.

David M. Livingston, Brownsville, Tennessee (on appeal), and Harold Gunn, Humboldt, Tennessee (at trial), for the appellant, Thomas Slates.

Paul G. Summers, Attorney General & Reporter; Gill Robert Geldreich, Assistant Attorney General; and William Bowen and Larry Hardister, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

In February of 2000, Charlotte Lumpkin, a confidential informant working undercover with the Drug Task Force in Milan, made a purchase of illegal drugs from the defendant in Milan. At approximately 5:00 or 6:00 p.m., she and undercover officer Jacque Bass went to the defendant's father's apartment, only to learn that the defendant was not there. After driving around the block a couple of times, the two observed Charles Kirby, who approached their vehicle and asked what they wanted. After answering, "a bill," which meant $100 worth of crack cocaine, Kirby instructed them to drive around the block. When they returned, Kirby, who was standing with the defendant on some railroad tracks, instructed her to step outside the vehicle. All then went to the defendant's father's apartment. Kirby remained outside. Ms. Lumpkin testified at trial that the defendant then led her

to a small room where he handed her a plastic bag of crack cocaine in exchange for five 20-dollar bills that had been provided by Officer Bass. Afterward, the crack cocaine was delivered to the officer.

Ms. Lumpkin testified that she and Officer Bass went to the defendant's father's apartment on a second occasion and learned that the defendant was on a wrecker call. Later, when she saw that the wrecker had returned, she acquired five 20-dollar bills from Officer Bass, went to the apartment, and purchased "a bill." Ms. Lumpkin then returned to the undercover officer with the drugs.

On June 2, 2000, Ms. Lumpkin and undercover officer Jacque Bass went to Rock & Shirl's Disco Club in Milan, where the defendant was playing darts. The defendant bought her a beer, finished his game of darts, and agreed to sell her another "bill." They got into the defendant's vehicle, drove to his father's apartment, and completed another crack cocaine transaction. Ms. Lumpkin then walked back to Rock & Shirl's and provided the cocaine to Officer Bass. All three transactions were recorded through a body wire.

Jacque Bass, an investigator with the Paris Police Department, testified that he worked with confidential informant Charlotte Lumpkin through the Twenty-Eighth Judicial District Drug Task Force. He stated that Ms. Lumpkin would generally meet him at the Drug Task Force office, where they would equip his vehicle with video and audio surveillance equipment and obtain "buy" money. Officer Bass recalled that Ms. Lumpkin made the first controlled purchase of drugs from the defendant in February of 2000. He confirmed that Charles Kirby approached their vehicle on West Front Street, learned that they wanted $100 worth of crack, and instructed them to drive around the block. Officer Bass stated that Ms. Lumpkin got out of the vehicle to meet two individuals, one of whom directed him to drive away. The officer drove until he saw Ms. Lumpkin walk from a house at Hale and West Front. She got into the vehicle and handed him some crack cocaine. Officer Bass also testified that he observed the defendant leave Rock & Shirl's with Ms. Lumpkin. He stated that he followed their vehicle to Hale and West Front and intended to wait there, but returned to the club when he saw a man from Paris who would recognize him. During cross-examination by defense counsel, Officer Bass acknowledged that the defendant does not appear in any of the surveillance videotapes and that because he was not familiar with the defendant's voice, he could not say whether it was recorded on any of the audiotapes. He agreed that Ms. Lumpkin was his sole source of information as to the identity of the seller of the cocaine.

Kenneth Jones, the case officer for the first two controlled drug purchases from the defendant, received the crack cocaine from Officer Bass, packaged it for the TBI, and handed it over to Officer Danny Lewis for testing. Officer Jones testified that Ms. Lumpkin, who did not have any criminal charges pending against her, was paid $100 per day whether she made a case or not. During cross-examination by the defense, Officer Jones acknowledged that the defendant did not appear in any of the surveillance videotapes, but contended that he could identify the defendant's voice on the audiotape of the last purchase. The officer acknowledged that he had been involved in a prior encounter with the defendant during a traffic stop and admitted that he held the defendant at gunpoint. He also confirmed that the defendant was a target of the police.

Danny Lewis, an officer with the Humboldt Police Department, testified that he had provided surveillance on the first two controlled purchases and that he was the case agent on the last purchase. He stated that he ultimately received the crack cocaine from each of the three purchases and hand-carried the drugs to the laboratory. Officer Lewis testified that there were never any inconsistencies in Ms. Lumpkin's reports regarding the buys, that Ms. Lumpkin was searched before and after each transaction, and that audio and video records were made of each encounter. Officer Lewis acknowledged that the defendant did not appear on any of the videotapes, but contended that the defendant's voice could be heard on the audiotapes of all three purchases. Ms. Lumpkin had criminal charges pending against her when he first approached her about becoming a confidential informant. According to Officer Lewis, he did not begin working with Ms. Lumpkin at that time because her husband objected and, when he saw her later, she did not have any charges pending against her. Officer Lewis acknowledged that Ms. Lumpkin has 43 prior forgery convictions. Officer Lewis testified that the defendant was a target of their investigation and explained that that accounted for their purchasing at least one-half gram of cocaine, a minimum threshold for a greater offense, in each of the three transactions.

The defendant, who is 43 years old and operates a wrecker business in Milan, testified that Officer Jones had once pointed a weapon at him, even though the officer had already searched and secured his vehicle and should have known that he had no weapons. The defendant contended that Jones and two other officers drew their guns when he reached for his cellular telephone and remarked, "I'm fixing to put a stop to you bothering me like this." He claimed that the officers knew he was reaching for his phone rather than a weapon and testified that he feared for his life because he believed Officer Jones was trying "to put [him] in jail or kill [him] one." The defendant denied having sold drugs to Charlotte Lumpkin, claiming that she lied because he and Ms. Lumpkin had engaged in a prior sexual relationship and because of the forgery charges. During cross-examination by the state, the defendant testified he had last had sex with Ms. Lumpkin eight or nine months earlier. While admitting that he had "messed with her and her sister both," he insisted that he had not had any confrontations with her. The defendant confirmed that his father lived in an apartment at Hale and West Front Street in Milan and remembered that Ms. Lumpkin had gone to the apartment a couple of times. He denied any recollection, however, of her having gone to the apartment in February or May. The defendant testified that he occasionally went to Rock & Shirl's to throw darts, but contended that he has never had a conversation with Ms. Lumpkin there. He denied that his voice was on the audiotapes and denied having sold illegal drugs.

I

Initially, the defendant asserts that the evidence is insufficient to support the verdict on count one because it consists solely of the uncorroborated testimony of an accomplice, Charlotte Lumpkin. The state responds that because Ms. Lumpkin is not chargeable with the same offense as the defendant, she is not an accomplice.

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the

reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

A defendant cannot be convicted upon the uncorroborated testimony of accomplices. Sherrill v. State, 204 Tenn. 427, 433-35, 321 S.W.2d 811, 814-15 (1959); Prince v. State, 529 S.W.2d 729, 732 (Tenn. Crim. App. 1975). An accomplice is defined as a person who knowingly, voluntarily, and with common intent with the principal offers to unite in the commission of a crime. Clapp v. State, 94 Tenn. 186, 194-95, 30 S.W. 214, 216 (1895); Letner v. State, 512 S.W.2d 643, 647 (Tenn. Crim. App. 1974). The rule is that there must be some fact testified to which is entirely independent of an accomplice's testimony; that fact, taken by itself, must lead to an inference that a crime has been committed and that the defendant is responsible therefor. State v. Fowler, 213 Tenn. 239, 245-46, 373 S.W.2d 460, 463 (1963). This requirement is met if the corroborative evidence fairly and legitimately tends to connect the accused with the commission of the crime charged. Marshall v. State, 497 S.W.2d 761, 765-66 (Tenn. Crim. App. 1973). Only slight circumstances are required to furnish the necessary corroboration. Garton v. State, 206 Tenn. 79, 91, 332 S.W.2d 169, 175 (1960). To be corroborative, the evidence need not be adequate in and of itself to convict. See Conner v. State, 531 S.W.2d 119, 125 (Tenn. Crim. App. 1975).

An accomplice is one who knowingly, voluntarily, and with common intent unites with the principal offender in the commission of the crime. Conner v. State, 531 S.W.2d 119, 123 (Tenn. Crim. App. 1975). A common test is whether the alleged accomplice could have been indicted for the offense. State v. Perkinson, 867 S.W.2d 1, 7 (Tenn. Crim. App. 1992). When the facts concerning a witness's participation in the crime are clear and undisputed, whether the witness is an accomplice is a question of law for the court. Conner, 531 S.W.2d at 123. In this case, Ms. Lumpkin, a purchaser, could not have been indicted for sale of cocaine. See Brown v. State, 557 S.W.2d 926 (Tenn. Crim. App. 1977) (holding that "a [drug] purchaser is not an accomplice of the seller, not being chargeable with the same offense"). Moreover, because Ms. Lumpkin was a confidential informant cooperating with the police, she could not have had a common intent with the defendant and could not, as the defendant argues, be criminally responsible for his conduct. See Tenn. Code Ann. § 39-11-402 (1) – (2) (requiring action "with the culpability required for the offense" or action "with the intent to promote or assist the commission of the offense" for criminal responsibility).; State v. Steve Edward Houston, No. 01C01-9606-CC-00280, slip op. at 3 (Tenn. Crim. App., at Nashville, June 26, 1997) ("None of the confidential informants were accomplices . . . and their testimony requires no corroboration."); State v. Preston Bernard Crowder and Cynthia

Diane Southall, No. 01C01-9304-CR-00143 (Tenn. Crim. App., at Nashville, March 14, 1995) ("In this case, [the alleged accomplice] was being utilized as an informant and was cooperating with the police, and she could not be operating with a common intent with the principal offender.").

Under Tennessee Code Annotated § 39-17-407, (a)(3), it is an offense for a defendant to knowingly sell a controlled substance. Here, the defendant was convicted for the February 2000 sale to Charlotte Lumpkin. Ms. Lumpkin testified that she went with the defendant to his father's apartment, where she purchased $100 worth of crack cocaine. Having been searched before the buy, she returned with a plastic bag of crack cocaine that she provided to Officer Bass, who saw her emerge from the defendant's father's apartment on Hale and West Front. There was some evidence that the defendant's voice could be heard on the audiotape. The evidence was sufficient for a jury to find beyond a reasonable doubt that the defendant was guilty of the indicted offense.

II

The defendant also asserts that the trial court erred by failing to consider alternative sentencing.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987). With certain statutory exceptions, none of which apply here, probation must be automatically considered by the trial court if the sentence imposed is eight years or less. Tenn. Code Ann. § 40-35-303(b) (Supp. 2000).

Among the factors applicable to probation consideration are the circumstances of the offense, the defendant's criminal record, social history and present condition, and the deterrent effect upon and best interest of the defendant and the public. State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978). The nature and circumstances of the offenses may often be so egregious as to preclude the grant of probation. See State v. Poe, 614 S.W.2d 403, 404 (Tenn. Crim. App. 1981). A lack of candor may also militate against a grant of probation. State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983).

The purpose of the Community Corrections Act of 1985 was to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community based alternatives to incarceration." Tenn. Code Ann. § 40-36-103. The community corrections sentence provides a desired degree of flexibility that may be both beneficial to the defendant and serve legitimate societal aims. State v. Griffith, 787 S.W.2d 340, 342 (Tenn. 1990). Even in cases where the defendant meets the minimum requirements of the Community Corrections Act of 1985, the defendant is not necessarily entitled to be sentenced under the Act as a matter of law or right. State v. Taylor, 744 S.W.2d 919 (Tenn. Crim. App. 1987). Generally, the following offenders are eligible for community corrections:

> (1) Persons who, without this option, would be incarcerated in a correctional institution;
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> (2) Persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5;
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> (3) Persons who are convicted of nonviolent felony offenses;
>
> (4) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;
>
> (5) Persons who do not demonstrate a present or past pattern of behavior indicating violence;
>
> (6) Persons who do not demonstrate a pattern of committing violent offenses; and
>
> Persons who are sentenced to incarceration or on escape at the time of consideration will not be eligible.

Tenn. Code Ann. § 40-36-106(a); see also Tenn. Code Ann. § 40-36-106(c).

In Ashby, our supreme court encouraged the grant of considerable discretionary authority to our trial courts in matters such as these. 823 S.W.2d at 171; see State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986). "[E]ach case must be bottomed upon its own facts." Taylor, 744 S.W.2d at 922. "It is not the policy or purpose of this court to place trial judges in a judicial straight-jacket in this or any other area, and we are always reluctant to interfere with their traditional discretionary powers." Ashby, 823 S.W.2d at 171.

Initially, the trial court failed to consider any form of alternative sentencing for the defendant. Our review is, therefore, de novo. Because he was convicted of a Class B felony, the defendant is not presumed to be a suitable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). Although the defendant was convicted of only one offense, a preponderance of the evidence at trial established that he sold crack cocaine to the confidential informant on three separate occasions, each time in an amount greater than one-half gram. See State v. Desirey, 909 S.W.2d 20, 31-32 (Tenn. Crim. App. 1995); State v. Eric DeWayne McElmore, No. 03C01-9802-CR-00056 (Tenn. Crim. App., at Knoxville, May 14, 1999). Testimony revealed that he was dealing drugs from the apartment of his 70-year-old father. The defendant had three prior convictions for which he had

received alternative sentencing: a 1998 misdemeanor conviction for possession of marijuana for which he was sentenced to 11 months and 29 days, suspended after service of 90 days; a 1995 disorderly conduct conviction for which he received a sentence of 30 days, suspended on payment of costs; and a misdemeanor weapons conviction for which he was sentenced to 30 days suspended. The presentence report also indicates that the defendant was convicted of petit larceny in 1980 and sentenced to two years in the Department of Correction. The defendant did not contribute to the presentence report. In our view, the trial court's order of incarceration was appropriate.

Accordingly, the judgment is affirmed.

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GARY R. WADE, PRESIDING JUDGE